232028

ASSOCIATION OF AMERICAN RAILROADS

Law Department
Louis P. Warchot
Senior Vice President-Law
and General Counsel

March 12, 2012

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: STB Finance Docket No. 35504, Union Pacific Railroad Company—Petition for Declaratory Order

Dear Ms. Brown:

Pursuant to the Decision served by the Board on December 12, 2011, please find the Reply Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of American Railroads

Attachment

425 3rd Street, SW I Washington, DC 20024 I P (202) 639-2502 I F (202) 639-2868 I lwarchot@aar.org

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

Of Counsel:

David L. Coleman
Paul A. Guthrie
J. Michael Hemmer
Paul Hitchcock
James A. Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Richard E. Weicher
W. James Wochner

Louis P. Warchot
Daniel Saphire
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Counsel for the Association of American Railroads

March 12, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

Introduction

In a decision served December 12, 2011 ("December Decision"), the Surface Transportation Board ("Board"), in response to a petition by Union Pacific Railroad Company ("UP"), instituted a declaratory order proceeding to remove uncertainty as to whether UP tariff provisions relating to the transportation of toxic by inhalation hazardous commodities ("TIH") are reasonable under 49 U.S.C. § 11101 and 49 U.S.C. § 10702. The specific UP tariff provisions at issue "require TIH shippers to indemnify UP against all liabilities except those caused by the sole, contributory, or concurring negligence or fault of UP." December Decision at 1.

The AAR filed opening comments on January 25, 2012. The AAR's comments focused on legal and policy issues pertaining to the scope of parties' obligations regarding TIH transport. The AAR took no position on, and did not address commercial interests or the specific terms of UP's, or any other railroad's, tariff provisions for TIH transport. In its comments, the AAR noted that the Board has the authority to find that

reasonable liability sharing arrangements in tariffs are consistent with the common carrier obligation and not unreasonable practices; and the Board should make such findings because railroads face untenable liability exposure solely because of the inherent nature of TIH materials that the railroads are required to transport. Finally, the AAR comments demonstrated that arrangements for sharing with shippers the liability associated with TIH transport are in furtherance of the Rail Transportation Policy under 49 U.S.C. § 10101.

Joint opening comments were filed by American Chemistry Council, The Chlorine Institute, The Fertilizer Institute, and The National Industrial Transportation League (collectively, "Interested Parties"). Opening comments were also filed by Canadian Pacific Railway Company, Union Pacific Railroad Company, BNSF Railway Company, Norfolk Southern Railway Company, Dyno Nobel Inc. ("Dyno Nobel"), Occidental Chemical Company ("Occidental"), Westlake Chemical Company, US Magnesium LLC, CF Industries, Inc. ("CF Industries"), Sunbelt Chlor and Alkali Partnership, Olin Corporation ("Olin"), Tdy Industries d/b/a ATI Wah Chang, and Canexus Chemicals Canada, L.P ("Canexus").

As shown below, the comments of the shipper interests do not refute the AAR's comments that it is consistent with 49 U.S.C. § 11101 and 49 U.S.C. § 10702 for a rail carrier, if it chooses to do so, to impose reasonable liability sharing arrangements on shippers as a condition of common carrier TIH rail transport.

I. The Board Has the Authority to Find – and Should Find -- That Liability Sharing Arrangements in Tariffs are Reasonable and Consistent with the Common Carrier Obligation

Contrary to the arguments contained in the opening comments filed by some of the shipper interests in this proceeding, *see, e.g.*, Interested Parties Opening Comments at 2-3, it is clear that removing uncertainty in this area is an appropriate use of the declaratory order process and that "there is no reason why the Board should not resolve the [Interstate Commerce Act] challenge, a matter committed to the Board's primary jurisdiction." December Decision at 2.

The Board's jurisdiction includes determination of the scope of the common carrier obligation (*i.e.*, what constitutes a "reasonable request" for service under 49 U.S.C. § 11101(a) or a "reasonable rule or practice" under 49 U.S.C. § 10702) and also extends to economic issues pertaining to the rail transportation of hazardous materials, including insurance and liability questions. *See*, e.g., *Akron, C. & Y. Ry. v. ICC*, 611 F2d 1162, 1170 (6th Cir. 1979) ("[Q]uestions of safety [regarding rail transport of nuclear materials] are also questions of risk and liability. A question of possible liability for damage resulting from carriage of a commodity is therefore within the Commission's jurisdiction as the regulator of the economics of interstate rail transport"); *Classification Ratings of Chemicals, Conrail*, 3 I.C.C.2d 331 (1986). The intersection of the common carrier obligation and the huge potential liability associated with the transportation of TIH materials requires the Board, when called upon by stakeholders, to consider the reasonableness of railroad practices designed to mitigate risk.

The shipper interests participating in this proceeding contend that there is unequal bargaining power between the railroads and shippers in the movement of TIH materials and therefore the Board should find tariff liability sharing arrangements cannot be reasonable. *See, e.g.,* Dyno Nobel Opening Comments at 4; Interested Parties Opening Comments at 9; Occidental Opening Comments at 5-6. Shippers suggest that indemnity provisions are "take it, or leave it" propositions. *See, e.g.*, Interested Parties Opening Comments at 11. This argument badly misrepresents the relative power of the parties when it comes to liability for TIH materials.

It is the railroad, not the shipper, that has obligations under law that cannot be refused. The shipper can elect to ship to another destination to minimize the distance traveled, to ship another less lethal product, or to co-locate so there is no need to ship at all. The railroad is currently obligated by law to accept the tendered shipment and transport it to destination without regard to potential liability. *See Union Pacific R.R. Co. – Petition for Declaratory Order*, STB Docket No. FD 35219 (served June 11, 2009). With the railroads' common carrier obligation, it is the railroads who are actually in a "take it only" situation. While the shippers can "leave" TIH rail transportation for other alternatives, the railroads cannot under current law and policy, even if they wanted to.

It is the common carrier obligation that mandates railroads to haul TIH materials. Therefore, it is part of the Board's responsibilities to consider how its interpretation of that obligation impacts the public, the railroads, and railroad customers. If there is a public interest need for railroads to be compelled to carry TIH materials, then the Board should recognize that there is corresponding public interest need for the railroad industry

to be able to take into account and protect itself against the enormous liability associated with transporting such TIH materials.

II. Railroads Face Untenable Liability Exposure Solely Because of the Inherent Nature of TIH Materials

Some commenting shippers argue that once a shipment is tendered to the railroad it is the railroad that is in custody of the hazardous material; and, therefore, the railroads should be subject to all liability related to a release. *See* Canexus Opening Comments at 3; Dyno Nobel Opening Comments, Legal Argument at 3; Occidental Opening Comments at 5; CF Industries Opening Comments at 6.

No party to this proceeding contested the railroad industry's outstanding safety record in handling TIH materials and many shippers point to rail being the safest and most efficient mode of transportation for their products. *See, e.g.,* Olin Opening Comments at 5; CF Industries Opening Comments at 14; Occidental Opening Comments at 2-3. The railroad industry is justifiably proud of its record, but it is not sound public policy to assume that TIH materials will always move by rail without incident.

Releases of TIH materials in transit can happen whether or not the railroads do anything wrong. Strict adherence by railroads to Department of Transportation approved safety regulations does not eliminate the problem or the concern. As the AAR, and its member railroads, point out in their opening comments, even actions by third-parties entirely beyond the control of railroads – such as motor vehicle drivers – could cause releases of TIH materials. Thus, railroads can be exposed to, and could potentially be found responsible for, enormous damage claims even where they were not at fault. This

potential liability that railroads face arises solely from the unusual inherent characteristics of the materials themselves that make them so deadly. *See* AAR Opening Comments at 9-10 (describing the characteristics of TIH materials).

Clearly the risk and liability exposure at issue in this proceeding arises solely from the dangerous nature of the TIH commodities themselves. If the commodities transported were lumber, coal, grain, or essentially any other commodity, and an incident occurred where the commodity was released from the rail car, the liability and exposure would be contained. Where a TIH release is involved, however, there is significant "bet the company" potential exposure.[1]

There are three groups that can bear the liability for any such exposure: the railroad that is forced to transport the commodity, the shipper/manufacturer that chooses to profit from the manufacture and transport of the commodity, or the public. If the public actually needs and benefits from the use of the commodity (and there are no alternatives available), it would be appropriate for the public to bear a reasonable allocation of any liability.[2] However, any such public liability requirement would require legislative action. While the AAR has advocated a "Price Anderson Act" or similar federal legislation to create a fair liability sharing regime, no such legislative action has been yet forthcoming.[3]

Without legislation which places some responsibility on the public for liability arising from the supposed public benefits of TIH commodities, it rests with the Board to

[1] Even when a TIH incident is less than catastrophic, a rail carrier is faced with the potential of substantial costs, such as evacuation costs, solely due to the dangerous nature of the TIH commodities.

[2] This proceeding is, of course, clearly not the proceeding to determine whether there are or are not alternative transportation options, or alternative products.

[3] The AAR has also sought the STB's support of such legislative action. *See* AAR Opening Comments at 29-31, STB Docket No. EP 677 (Sub-No. 1) (filed July 10, 2008).

provide through regulatory policy, a regime which allows for a fair allocation of liability among private parties where TIH is transported by rail. If public policy and the law are to require the transport of TIH materials under the common carrier obligation, it is also fair and reasonable for public policy and regulatory law as interpreted by the Board to allow a railroad to condition such required TIH transport upon reasonable liability sharing arrangements with the shipper.

III. Liability Sharing Arrangements Associated with TIH Transport Reflect Sound Public Policy in Furtherance of Rail Transportation Policy Goals

As the AAR noted in its opening comments, the Rail Transportation Policy ("RTP") guidelines of 49 U.S.C. § 10101 charge the Board with promoting the safety and efficiency of the rail transportation system to the public, shippers and rail employees.[4] RTP also expressly directs the Board to consider the financial soundness of the rail industry. When these guidelines are applied to determine whether a specific rail practice related to the transportation of TIH materials is reasonable, the Board should consider that a rail carrier faces potential "bet the company" exposure each time it transports these TIH materials. The "financial soundness" of the rail industry and the "public health and safety" are potentially at risk each time these materials are transported by rail. Thus, in assessing the reasonableness of a rail carrier's practices related to the transportation of

[4] These policy provisions include: "to promote a safe and efficient rail transportation system... "(49 U.S.C. § 10101(3); "to ensure the development and continuation of a sound rail transportation system...to meet the needs of the public and the national defense" (49 U.S.C. § 10101(4); "to foster sound economic conditions in transportation...." (49 U.S.C. § 10101(5); "to operate transportation facilities and equipment without detriment to the public health and safety" (49 U.S.C. § 10101(8); and "to encourage...safe and suitable working conditions in the rail industry" (49 U.S.C. § 10101(11).

TIH materials, the hazards to the public and employees and the economic risks to the carrier should be major factors.

It is not surprising that parties that do not currently shoulder the burden of potential liability for TIH release incidents object to any change in the status quo. But scratch the surface of the commenting shippers' arguments regarding public policy and one finds that the concerns raised in their opening comments are really concerns about cost, and not concerns about mitigating risk or protecting the public. Shippers point to the effect that liability sharing provisions could have on rail rates. *See, e.g.*, Occidental Opening Comments at 6. But the issue in this proceeding is not about rates. It is about the potentially huge liability exposure created by the fundamentally dangerous nature of the commodities themselves. In any event, the Board's rate reasonableness procedures do not currently capture the unique costs of TIH transportation, as the Board itself has acknowledged. *See Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials*, STB Docket No. EP 681 (served January 5, 2009).

Shipper claims that reasonable liability sharing arrangements will drive TIH materials off the rail system are unsupported. *See, e.g.,* CF Industries Opening Comments at 14; Canexus Opening Comments at 5. It is simplistic and incorrect to assume that if a railroad rule or practice has the effect of reducing the amount of TIH shipped by rail then that traffic will automatically shift to the roads. First, whether or not TIH shipments would move to motor carriage would depend on the specific circumstances. A motor carrier could refuse to haul TIH shipments or the terms that the motor carrier offers the shippers may be less desirable than the terms offered by the rail

carrier with a liability sharing requirement. Second, shippers concede that TIH shipments can and do move by truck today. Often a leg of a TIH rail movement is by truck. Reduced shipments by rail would therefore reduce this possible hazard on the roads for the truck portion of those moves. Third, fewer rail TIH shipments do not necessarily mean more motor carrier shipments. The result could be shipping less lethal products; and, in that case, public safety will be improved.

The concern simply asserted that particular TIH shippers will go out of business entirely if railroads include liability sharing arrangements in their tariffs is clearly speculative. *See, e.g.*, Canexus Opening Comments at 5. The shippers themselves argue that their products are integral to a modern economy. *See, e.g.*, Canexus Opening Comments at 2. If in some cases, the customers of a particular TIH shipper decide to use other less dangerous products or source their TIH materials so as to minimize risk, the Board should not be concerned. In fact, that should be the goal. The common carrier obligation of railroads should not be used to maintain the status quo and prevent progress leading to a safer and more secure rail network and communities through which railroads operate.

Conclusion

Based upon the general legal principles, prior case law, and rail transportation policy considerations discussed above, the Board should find that the imposition by a rail carrier, if it chose to do so, of reasonable liability sharing arrangements with a shipper of TIH materials, as a condition of TIH transportation, is consistent with the common carrier obligation under 49 U.S.C. § 11101 and a reasonable practice under 49 U.S.C. § 10702.

Respectfully Submitted,

Of Counsel:

David L. Coleman
Paul A. Guthrie
J. Michael Hemmer
Paul Hitchcock
James A. Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Richard E. Weicher
W. James Wochner

Louis P. Warchot
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Counsel for the Association of American Railroads

CERTIFICATE OF SERVICE

I, Rosita M. N'Dikwe, hereby certify that on this 12th day of March 2012, I served by e-mail a copy of the Reply Comments of the Association of American Railroads to those parties listed as Parties of Record in the Surface Transportation Board's decision served January 23, 2012 in STB Finance Docket No. 35504.

Respectfully Submitted,

Rosita M. N'Dikwe

Rosita M. N'Dikwe